THE DISQUALIFICATION OF JUDGES.—The history of the common law on the subject of the disqualification of judges has been considerably confused by no less an authority than Sir William Blackstone. On the authority of a passing remark, of doubtful connection, by Lord Coke that "judges or justices cannot be challenged",[1] he leads one to think that the old common law disqualifications were then no longer law in England.[2] In another section,[3] not cited by Blackstone, Coke deals directly with the subject of judicial disqualification and quotes approvingly the old maxim that a man should not be his own judge. Blackstone himself hints elsewhere[4] at a different conception of the law, and certainly the legal writers of his period do not bear out his apparent conclusions.[5] However, Blackstone's authority has unquestionably influenced the conservative stand of the common law on this subject.

It is frequently stated by the American courts that "interest" is the only common law disqualification of a judge.[6] But the cases including kinship as a disqualification at common law are so numerous and authoritative as to carry the weight of authority.[7]

Today the grounds of judicial disqualification are, in most of the states, the subject matter of some specific statute or constitutional provision.[8] Consequently, each case must be studied with particular reference to the law under which it arises. The interpretation of such statutory provisions, which disqualify because of "relationship to a party", has produced a square conflict of authority. Many courts, fearing excessive delays, have rigidly construed the word "party" to mean an "actual party to the record",[9] while others have followed the liberal

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[1] 2 Co. Litt. 294a.

[2] 3 Bl. Comm. *361. See *In re* Davis' Estate (1891) 11 Mont. 1, 18, 27 Pac. 342; Hutchinson *v.* Manchester St. Ry. (1905) 73 N. H. 271, 275, 60 Atl. 1013.

[3] 1 Co. Litt. 141a.

[4] 3 Bl. Comm. *299n.(d).

[5] 4 Com. Dig. 5, 6; 14 Vin. Abr. 573; 2 Bacon Abr. 621.

[6] See City of Detroit *v.* Detroit City Ry. (1893) 54 Fed. 1, 19; Matter of Dodge & Stevenson Mfg. Co. (1879) 77 N. Y. 101, 112.

[7] See Turner *v.* Commonwealth (1859) 59 Ky. 619, 626; Oakley *v.* Aspinwall (1850) 3 N. Y. 547, 551; State *ex rel.* Cook *v.* Houser (1904) 122 Wis. 534, 578, 100 N. W. 978; Freeman, Judgments (3rd ed.) § 145. If not a disqualifying ground, kinship was at least sufficient reason for allowing the judge to withdraw. Steamboat Co. *v.* Livingston (N. Y. 1825) 3 Cow. 713, 724.

[8] N. Y. Consol. Laws, c. 30 (Laws of 1909 c. 35) § 15; Iowa Ann. Code (1897) §§ 284, 3263; Minn. Gen. Stat. (1913) §§ 7724, 7727; Fla. Comp. Laws (1914) § 1337; Mich. Ann. Stat. (Howell 2nd ed.) § 12600; Cal. Code Civ. Proc. § 170. Concerning disqualification in criminal trials, see 6 Columbia Law Rev. 279.

[9] Matter of Dodge & Stevenson Mfg. Co. *supra*, footnote 6; Hundley *v.* State *ex rel.* Milton (1904) 47 Fla. 172, 36 So. 362; Winston *v.* Masterson (1894) 87 Tex. 200, 27 S. W. 691, apparently overruled by Jirou *v.* Jirou (Tex. 1911) 136 S. W. 493, 496; see Hume *v.* Bank (1882) 78 Tenn. 1; Casmento *v.* Barlow Bros. Co. (1910) 83 Conn. 180, 76 Atl. 361; *cf.* Merchants Bank *v.* Cook (1826) 21 Mass. 405; Howell *v.* Budd (1891) 91 Cal. 343, 352, 27 Pac. 747.

and more sensible construction of including persons beneficially interested.[10]

A judge who is a stockholder in a corporation which is either a party to the suit,[11] or not a party but interested in the outcome,[12] is disqualified by reason of "interest". By the weight of authority, however, a stockholder has not been regarded as a "party" within the meaning of these statutes against relationship; so a judge is not disqualified because of kinship within the prohibited degree to a stockholder of a corporation which is party to the suit.[13] This rule is based primarily on practical considerations in the administration of justice, otherwise in modern days of corporate business it might be very difficult, if not impossible, to find a judge competent to sit in suits involving corporations.

A typical illustration of the prevailing view is the recent case of *Favorite* v. *Superior Court* (Cal. 1919) 184 Pac. 15. The judge's wife was a stockholder in the defendant corporation. The court stated that a stockholder was not a "party" within the meaning of the California Code,[14] (notwithstanding that that state probably follows the liberal interpretation of the word "party"),[15] and therefore, that the judge was not disqualified. Apparently, from the court's opinion, the stock was part of the wife's separate personal estate. Had it been community personally, in view of the husband's powers under the Code,[16] the judge should have been disqualified for "interest". However, considered as separate personalty, the husband's remote and contingent expectancy in the stock on the wife's death would not be a disqualifying

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[10]Dobbins *v.* City of Marietta (1918) 148 Ga. 467, 97 S E. 439; Jirou *v.* Jirou, *supra,* footnote 9; Johnson *v.* State (1908) 87 Ark. 45, 112 S. W. 143; *cf.* Gehlert *v.* Quinn (1908) 38 Mont. 1, 98 Pac. 369; see Birdsall *v.* Fuller (N. Y. 1877) 11 Hun 204. It is believed from the strong dicta in Howell *v.* Budd, *supra,* footnote 9, that California would adhere to this rule. See also 12 Columbia Law Rev. 647.

[11]State *v.* Mack (1902) 26 Nev. 430, 69 Pac. 862; State *ex rel.* Colcord *v.* Young (1893) 31 Fla. 594, 12 So. 673.

[12]Adams *v.* Minor (1898) 121 Cal. 372, 374, 53 Pac. 815; *cf.* Jones *v.* American Cent. Ins. Co. (1910) 83 Kan. 44, 109 Pac. 1077.

[13]Searsburgh Turnpike Co. *v.* Cutler (1834) 6 Vt. 315; Matter of Dodge & Stevenson Mfg. Co., *supra,* footnote 6; Kingman-Texas Implement Co. *v.* Herring Nat'l Bank (Tex. 1913) 153 S. W. 394; Place *v.* Butternuts, *etc.* Mfg. Co. (N. Y. 1863) 26 How. Pr. 601, reversing (N. Y. 1857) 28 Barb. 503; *cf.* Merchants Bank *v.* Cook, *supra,* footnote 9; *contra,* Davis Colliery Co. *v.* Charlevoix Sugar Co. (1908) 155 Mich. 228, 118 N. W. 930; Smith *v.* Amiss (1903) 30 Ind. App. 530, 66 N. E. 501 (*semble*).

[14]Cal. Code Civ. Proc. § 170, "No justice, judge . . . shall sit or act as such in any action or proceeding: (1) To which he is a party or in which he is interested; (2) When he is related to either party, or to an officer of a corporation which is a party, or to an attorney, counsel, or agent of either party, by consanguinity or affinity, within the third degree . . .; (4) When it appears from the affidavit or affidavits on file that either party cannot have a fair and impartial trial before any judge of a court of record about to try the case by reason of the prejudice or bias of such judge, said judge shall forthwith secure the services of some other judge, of the same or another county, to preside at the trial of said action or proceeding. . . ."

[15]See *supra,* footnote 10.

[16]Cal. Civ. Code (Supp. 1917) § 172.

"interest" within the general conception of that term.[17] The instant case is noteworthy in that the same problem previously arose in the same jurisdiction[18] and the court tacitly assumed an opposite conclusion on the precise point at issue, as a step in its reasoning. There the judge was a first cousin by marriage to a stockholder in the appellant corporation. The court held he was not disqualified because such relationship did not fall within the degree forbidden by the statute. By basing its decision on the degree of affinity the court tacitly assumed that the stockholder was a "party".

By way of comparison, in *First Nat'l Bank* v. *McGuire*,[19] on the material facts of *Favorite* v. *Superior Court*, the judge was held disqualified under common law principles alone, without any statutory aid. Focusing its attention on the common law disqualification of interest, the court went back to the fundamental reasons therefor: (1) The probability of giving a biased judgment, and (2) the paramount policy of keeping the administration of justice free from public suspicion. They concluded that the same reasons which disqualify a judge when interested as a shareholder should also disqualify him when his own wife is interested as a shareholder. Since it is difficult to regard the husband's remote expectancy in the wife's separate personal estate, contingent on her death, as a disqualifying "interest",[20] this decision is really an extension of common law principles to include personal bias arising from too near relationship to a shareholder who is merely interested in the outcome of the suit. The decision appeals strongly to one's sense of propriety and raises squarely the general problem of judicial prejudice.

Bias or prejudice unsupported by interest or kinship to a party is not a ground for disqualification at common law.[21] However, California and many other states now have a specific statute against bias and prejudice,[22] which offers the solution of those cases that cannot be grouped conveniently under either "interest" or "kinship to a party" as those concepts have been generally defined. These statutory provisions on prejudice, being open to the grossest abuse, have been very rigidly interpreted and applied. The construction usually given them is that the prejudice contemplated therein must be against the defendant personally.[23] It is submitted that that construction is too narrow

[17] *Cf.* Inhabitants of Northampton *v.* Smith (1846) 52 Mass. 390, 395; City of Oakland *v.* Oakland Water Front Co. (1897) 118 Cal. 249. 252, 50 Pac. 268. However, the concept of "interest" is growing. *Cf.* Wilcox *v.* Royal Arcanum (1914) 210 N. Y. 370, 104 N. E. 624.

[18] Robinson *v.* Southern Pac. Co. (1895) 105 Cal. 526, 557, 38 Pac. 94.

[19] (1899) 12 S. D. 226, 80 N. W. 1076.

[20] See *supra*, footnote 17.

[21] See 16 Columbia Law Rev. 162; People *v.* Compton (1899) 123 Cal. 403, 412, 56 Pac. 44; State *ex rel.* Cook *v.* Houser, *supra*, footnote 7; *contra*, State *ex rel.* Barnard *v.* Board of Education (1898) 19 Wash. 8, 52 Pac. 317; People *ex rel.* Miller *v.* Elmendorf (1900) 51 App. Div. 173, 64 N. Y. Supp. 775.

[22] Cal. Code Civ. Proc. § 170 (4), *supra*, footnote 15; 6 Ill. Stat. Ann. (Jones & Ad. 1913) § 11,504; 36 Stat. 1090, U. S. Comp. Stat. 1916, § 988. See 16 Columbia Law Rev. 162.

[23] McEwen *v.* Occidental Life Ins. Co. (1916) 172 Cal. 6, 11, 155 Pac. 86, relying on a *dictum* in Western Bank of Scotland *v.* Tallmann (1862) 15 Wis. 92; Bent v. Lewis (1884) 15 Mo. App. 40.

and eliminates many legitimate grounds of prejudice. Furthermore, no case has been found which required such a construction of the statute for its decision. Many of the cases cited to sustain that proposition arose under the common law[24] or held that the statutory grounds, which did not include prejudice, were exclusive,[25] and could not possibly stand for any rule of interpretation of a statute involving prejudice. Some cases arising under statutes rightly hold that the facts supporting the claim of prejudice must be set forth,[26] or decide that the particular group of facts alleged do not show prejudice.[27] Others simply decide that prejudice against the defendant personally is sufficient,[28] and not that such is the only disqualifying prejudice. Still others rest on the peculiar wording of the statute,[29] or were decided on other grounds,[30] or lay down no such doctrine.[31] By reason of the formidable array of facts generally required to make out the alleged prejudice of the judge, and as a personal prejudice was actually established in many of the instances of disqualification for bias, the courts have been easily led into the overstatement that the statutory prejudice intended was one against the defendant personally.

In this connection, a comparatively recent Colorado case,[32] arising under a prejudice statute, discards the above-mentioned rule and lays down the following very elastic and sensible test: "No particular facts are required in the statute as constituting prejudice, the other ground of incompetency, and it would, therefore, seem that if there are any facts and circumstances disclosed from which a deduction could reasonably be made that a judge has a leaning toward one side of a question involved, from other considerations than those belonging to it, or a bias in relation thereto which would in all probability interfere with fairness in judgment, he is incompetent to try the cause for he is then, within the meaning of the statute, prejudiced." In other words, the question is whether the circumstances disclosed by the affidavits are such that the inference of resulting prejudice is reasonable or too speculative.[33]

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[24]Foreman *v.* Hunter (1882) 59 Ia. 550, 13 N. W. 659; Bent *v.* Lewis, *supra,* footnote 23; see Bryan *v.* State (1899) 41 Fla. 643, 659, 26 So. 1022.

[25]Elliott *v.* Hipp (1910) 134 Ga. 844, 848, 68 S. E. 736; Johnson *v.* State (1893) 31 Tex. Cr. 456, 20 S. W. 986.

[26]Conn *v.* Chadwick & Co. (1880) 17 Fla. 428; State *v.* De Maio (1903) 69 N. J. L. 590, 55 Atl. 644.

[27]State *v.* Parmenter (1905) 70 Kan. 513, 517, 79 Pac. 123; Johnston *v.* Dakan (1908) 9 Cal. App. 522, 525, 99 Pac. 729.

[28]Turner *v.* Commonwealth, *supra,* footnote 7.

[29]*Ex parte* American Steel Barrel Co. (1913) 230 U. S. 35, 33 Sup. Ct. 1007; State *v.* Chapman (1890) 1 S. D. 414, 44 N. W. 411.

[30]Western Bank of Scotland *v.* Tallman, *supra,* footnote 23; Ingles *v.* McMillan (1911) 5 Okla. Cr. 130, 113 Pac. 998.

[31]State *v.* Johnson (1889) 104 N. C. 780, 10 S. E. 257.

[32]People *ex rel.* Burke *v.* District Court (1915) 60 Colo. 1, 10, 152 Pac. 149.

[33]*Cf.* City of Detroit *v.* Detroit City Ry., *supra,* footnote 6, at p. 18; Estate of Friedman (1915) 171 Cal. 431, 153 Pac. 918; Day *v.* Day (1906) 12 Idaho 556, 568, 86 Pac. 531; Wathen, Mueller & Co. *v.* Commonwealth (1909) 133 Ky. 94, 116 S. W. 336; Hall *v.* Thayer (1870) 105 Mass. 219. Kentucky apparently recognizes "partisan feeling" as a disqualification

Returning to the case of *Favorite* v. *Superior Court*, the applicability of the prejudice statute to such a case was not even hinted at in the court's opinion. Applying the rule contended for to its facts, it would certainly seem that the inference of bias resulting from the marital relationship with a stockholder in the defendant corporation is not too remote or speculative, and that, therefore, the judge should have been found incompetent on the ground of bias, had the petitioners relied thereon in their application for a change of venue.[34]

THE EMPLOYMENT OF DECOYS IN THE DETECTION OF CRIMINALS.—It is elementary that for most crimes two elements are necessary—the criminal act and the criminal intent. In the case of felonies, he who does the act is the principal, and the one who induces him is the accessory before the fact; while in the case of misdemeanors both the actor and the instigator are principals. Where the crime is not carried out or where it is only partially executed, the inducing party is nevertheless guilty of solicitation, and where the acts come close enough to the commission of the crime, he is guilty of an attempt.

Where a man incites and participates in a crime for the sole purpose of having the perpetrator caught and punished, some courts regard the former as an accomplice,[1] but most jurisdictions hold him not guilty, since he has not the requisite intent,[2] and all courts are agreed as to his innocence where the principal had originated the intent himself and is merely encouraged by the decoy.[3] Even where homicide or physical harm results from the instigation of the decoy, and his subsequent failure to frustrate the plot, it seems that he cannot be held for the crime incited, but is liable in damages only.[4] He may not, however, habitually violate the law in order to detect the criminal.[5]

How do the solicitations of the decoy affect the person induced to commit the crime? It seems that the latter should be punished at all events where the necessary elements—the criminal act and the criminal

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under its prejudice statute. See Kentucky Jour. Pub. Co. *v.* Gaines (1908) 139 Ky. 747, 751, 110 S. W. 270. Ingles *v.* McMillan, *supra,* footnote 30, also quotes approvingly People *v.* Findley (1901) 132 Cal. 301, 304, 64 Pac. 472, which lays down by way of *dictum* the rule contended for.

[34]The rule of construction that the expression of one thing excludes all others was applied by the court to Subd. 2 of the Code Section in question, *supra,* footnote 14. A judge, therefore, is not disqualified under this statute by reason of his relationship to any person connected with a corporation except an officer thereof. It seems that the only possible way of disqualifying a judge in California on such facts is by treating the problem from the prejudice standpoint.

[1]Dever *v.* State (1895) 37 Tex. Crim. 396, 30 S. W. 1071; Davis *v.* State (Tex. 1913) 158 S. W. 288.

[2]Backenstoe *v.* State (1900) 19 Ohio Cir. Ct. 568; Price *v.* People (1884) 109 Ill. 109; People *v.* Noelke (1883) 94 N. Y. 137; see also People *v.* Emmons (1908) 7 Cal. App. 685, 692, 95 Pac. 1032.

[3]See State *v.* Gibbs (1909) 109 Minn. 247, 123 N. W. 810; Campbell *v.* Commonwealth (1877) 84 Pa. 187, 197.

[4]1 Wharton, Criminal Law (11th ed.) § 271; *cf.* Campbell *v.* Commonwealth, *supra,* footnote 3; but see Dever *v.* State, *supra,* footnote 1.

[5]See McGee *v.* State (Tex. 1902) 66 S. W. 562, 563.